

Guardianship and Conservatorship in Iowa

Issues in Substitute Decision Making

It may be very difficult to decide if a guardianship or conservatorship is needed. The questions and points in this article may help in making that decision.

Determining if Guardianship or Conservatorship is Necessary

Family members often take on informal decision making roles for a person before he or she becomes incompetent. A common example would be an adult son who assists his elderly father with personal care or financial matters. If the father's mental "capacity" is called into question due to Alzheimer's or other diseases affecting the father's decision making ability, a court order appointing the son as guardian or conservator may be needed. This would legally allow him to make decisions on behalf of his father. Other times the need for a guardian or conservator may come about very quickly, for example, as a result of a severe head injury from an accident.

Who Needs a Guardian or Conservator?

Those who may need a guardian or conservator include many different types of people such as:

- A person with a developmental disability;
- A person who is mentally ill;
- A person who has experienced a stroke or a head injury which may have resulted in a mental disability;
- A person who has a disease such as Alzheimer's which affects decision making ability.

A person may fit into one of these categories, but not be in need of a guardian or conservator. A person's need for decision making support or for a substitute decision-maker will vary. It will depend on the person's ability to make reasonable decisions about health, safety, and personal needs. There may be formal and informal support from family or friends or other resources. There may have been adequate planning to make sure that his or her needs are met.

Assessing the Need

The need for support in decision making has to be assessed for each person individually. This article and the attached tool focus primarily on needs of the "person," meaning the needs for health, safety, and daily living. However, issues of the "estate," meaning how property is managed are also included.

What are the Criteria for Establishing a Guardianship or Conservatorship?

To establish a guardianship or conservatorship, the court must find clear and convincing evidence that:

- The person is incompetent;
- The person needs the supervision and protection of a guardian or conservator;

If evidence of the availability of third-party assistance is provided, then the court can consider the effect of such assistance in meeting the needs of the person and in determining whether the person is incompetent.

How is Incompetency Determined?

Under Iowa law, an incompetent person is one who has “a decision-making capacity which is so impaired that the person is unable to care for the person’s personal safety or to attend to or provide for necessities for the person such as food, shelter, clothing, or medical care without which physical injury or illness may occur.” Under this definition, functional limitations are important in determining incompetence. Iowa law specifically requires that the functional limitations of the proposed ward be considered. Under Iowa law, “functional limitations” is defined as “the behavior or condition of a person which impairs the person’s ability to care for the person’s personal safety or to attend to or provide for necessities for the person.”

There are three important factors in determining incompetence:

- Decisional Capacity
- Impairment
- Functional Capacity

Decisional Capacity. “Decisional capacity” means a person’s ability to understand and make decisions about his or her needs.

- Is the person aware of an unmet need or inability in managing personal needs?

- Has the person been informed about, and does the person understand, the variety of alternatives available to meet these needs?
- Does the person understand and appreciate the choice made, and the potential risks and the benefits?

Impairment. “Impairment” generally refers to a person’s diagnosed disability or medical condition which affects the person’s decision making skills.

Functional Capacity. “Functional capacity” means a person’s practical ability to meet personal needs, or take necessary action to have needs met. It must be determined whether and how well the individual can perform activities to meet personal needs and how much assistance is needed with decision making.

Using This Assessment Tool

Purpose

This document was developed to assist in the often difficult task of deciding whether a person needs a guardian or conservator to help him or her maintain a better quality of life. The attached assessment instrument is not a test and is not a required form of the Iowa Department of Human Services or of the court. Instead, it is an informal tool to use when gathering information about a person’s capacity for making decisions to meet his or her personal needs.

The information gathered for this assessment process can be used to support the need for supervision of the proposed ward.

Using This Assessment to Determine Functional Capacity

The assessment tool should help to weigh the quality and quantity of information received in the process of trying to protect the health and welfare of the person in need. The results of this tool may aid in deciding whether to recommend the appointment of a guardian or conservator. The aim of this tool is to assist in making sure the decision to take away the legal rights of a proposed ward is done as carefully and confidentially as possible. It is important to meet with the person more than once to properly determine functional capacity.

Review of Related Information

In order to make sure there is sufficient information to properly complete any assessment, the following must be obtained and reviewed:

Social History - Obtain a written report from social worker or interview family/friends.

Medical Assessment - Obtain from person's primary physician. It should state what effect, if any, the person's medical condition and medications have on his or her decision making abilities.

Current Service or Care Plans - Obtain from social worker or health or home care provider.

Qualifying Statement for the Use of This or Any Other Assessment Tool

The goal in making decisions about a person's capacity should be to allow a person to make decisions for himself or herself to the fullest extent possible, even if others disagree with those decisions.

An assessment may help you in making decisions about the use of guardianship/conservatorship in cases where no other resources exist.

Be cautious about confusing dependency on physical assistance to perform or complete certain functions with the need for a guardian or conservator. The two are not the same.

Look for alternatives to guardianship/conservatorship, such as: Power of Attorney (for finances), Durable Power of Attorney for Health Care Decisions, Social Security Representative Payees, and community people who might provide volunteer care if no family exists or is unwilling or unable to get involved.

Guardianship or conservatorship affects the rights of wards. Remember that you would not freely allow others to make your decisions for you.

Try to stand in the other person's shoes. Would you want a guardian or conservator if you were in the same situation?

Generally, guardianship/conservatorship should not be used to control persons who choose to behave in a disruptive or uncontrolled manner.

Basic Considerations When Performing and Interpreting Assessments

Keep these points in front of you as you complete each section of the assessment. Consider these points when evaluating the person's decision making abilities in each area.

- Be specific when listing or assessing an ability or skill, and needs or conditions, particularly with respect to self-sufficiency. Describe examples of the person's decision making as it relates to the specific area.
- Determine how each affects the person's functional capacity, meaning the person's ability to reasonably make sure that his or her needs and rights are met and protected to sufficiently avoid or prevent neglect/abuse/maltreatment/exploitation.
- Don't take anything for granted. Question the decisions of persons providing information to you, including doctors, social workers, lawyers, and others who make judgments about those they do not know well.
- Determine possible need for second opinions regarding medical/mental/emotional conditions/diagnoses and treatment recommendations as they affect functional capacity.
- Document clearly what reasonable means of formal/informal support or adaptations have been attempted to increase or maintain the person's functional capacity. Document what formal or informal supports may be necessary to assure the person achieves and maintains optimal functional capacity.

Final Analysis

If, after completing this assessment, the information supports a need for guardianship or conservatorship, careful planning should occur to make sure it is the least restrictive possible. A guardianship or conservatorship plan should be developed which includes specific reasons for each power to be granted to the guardian or conservator and how services and supports will be used to help eventually restore the ward's capacity, if possible.

Acknowledgments

The Minnesota Department of Human Services has graciously allowed this assessment tool to be used with some minor modifications.

Assessment Tool

Name:

DOB:

Address:

Date of Assessment:

Name of Assessor:

Title/Relationship:

Names of others consulted for completion of this assessment:

Title/Relationship:

Additional evaluations/assessments reviewed as part of this assessment:

Date completed:

Current legal status:

Minor (age 17 or younger)

- Parent is legal guardian
- State is legal guardian
- Other person is legal guardian; name
- Other, explain

Adult (age 18 or older)

- Own legal representative
- Has valid Power of Attorney (for finances)
- Has valid Life-Sustaining Procedures Declaration (Living Will)
- Has valid Durable Power of Attorney for Health Care Decisions
- Has Social Security Representative Payee
- Has Court Appointed Guardian
- Has Court Appointed Conservator
- Other, please describe other formal or informal supports in place which this person relies on in order to meet personal or financial responsibilities

Point to Consider

Many conditions which will affect the need for a guardianship or conservatorship are episodic in nature. It may therefore be necessary to visit the person several times.

Open Ended Comments Regarding:

Describe how the person's abilities in these areas affect his or her self-sufficiency and functional ability to make reasonable decisions to assure that his or her needs are met, rights are protected, and abuse, neglect, or exploitation are avoided. Be specific, give examples.

A. Physical/Mental Status

1. Communication

Can the person speak or communicate his or her wants and needs in any manner?

Primary Language

Secondary Language

Expressive

Expressive Communication is:

- Functional, understood by strangers
- Understood by familiar listeners
- Difficult to understand even by familiar listeners
- Unintelligible even to familiar listeners

Mode of Expressive Communication:

- Spoken language
- Combination of spoken language and signs and/or gestures
- Combinations of signs and/or gestures
- Single signs and/or gestures
- Adaptive or augmentative communication aid

Level of expressive communication:

- ___ Uses complex conversation to express abstract ideas & wants/needs
- ___ Uses simple conversation to express routine wants/needs/preferences
- ___ Uses simple two to three word phrases to communicate wants/needs/preferences: e.g. come here, give me
- ___ Uses simple single words to express needs/wants: e.g. yes, no, stop
- ___ Is able to talk but conversation or responses to questions are irrelevant or off topic
- ___ Does not have functional expressive communication

Point to Consider

When evaluating communication skills remember that expressive skills are not a sole indicator of comprehensive skills. Consider the various options for adaptive communication aids and note why the aids have been used or cannot be used by the individual.

Receptive

Level of comprehension:

- ___ Comprehends complex conversation involving abstract ideas; remembers tasks/directions for 5-7 days
- ___ Comprehends simple conversation involving routine matters; remembers compound directions for at least 24 hours
- ___ Comprehends phrases, two to three words: come here, sit down; remembers simple two-step directions at least for an hour
- ___ Comprehends simple phrases or single words: yes, no, sit, stop; requires frequent verbal prompts to remember directions
- ___ Comprehends only with modeling prompts/gestures; requires frequent verbal & physical prompts to remember directions
- ___ Does not comprehend verbal, visual, or gestural communication; does not remember directions, requires hand-over-hand assistance to participate in activity.

Reading/Writing Skills

Level of literacy:

- Can read complex instructions and follow through, e.g. can follow medications prescriptions instructions
- Can read simple instructions and follow through, e.g. can read and/or recognizes warning labels/signs in home and community and takes appropriate action, can self-administer medications with minimal assistance
- Recognizes by sight, but can't read signs/warnings in home and community, takes appropriate action, e.g. obeys stop lights and street signs, warning signs/danger signs, cannot self-administer medication – requires physical and/or verbal prompts
- Has no functional reading or recognition skills

2. Medical

Physical Evaluation

What are the areas of medical need? What are the known medical diagnoses/condition, if any? Are they chronic (long-term, possibly treatable, but not curable) or acute (short-term, treatable and curable)?

Be specific and list each separately based upon known diagnosis by a physician.

Medications

What prescription medications does the person take?

If any, for what diagnosis or symptom are they prescribed? How is the medication supposed to affect that diagnosis or symptom? What is the current dose? How long has the person been on this medication? When was the last medication review? Are there are other possible treatment options to medications which could be used?

Is there regular use of non-prescription medications? If yes, what?

3. Emotional/Mental Condition

Orientation

Awareness of time, date, place, persons:

- Can function independently within home, work, and community environment
- Is independently oriented to time, place, date, self, others
- Is oriented to a set daily routine and environment (bed time, meal times, work time, etc.)
- Needs occasional reminders about daily routine and environment
- Needs frequent reminders about daily routine and environment
- Needs continual assistance to function within daily routine and familiar environment
- Distinguishes between strangers, acquaintances, friends, family
- Knows which people to ask for help/assistance
- Recognizes familiar people and remembers their names
- Responds to own name
- Is unresponsive to routine/environment/ persons

Alcohol/Substance Abuse

Is there indication of alcohol or drug abuse? If yes, is the frequency and intensity of use known?

Mental/Emotional Impairment

Is there a mental or emotional impairment or condition which appears to limit mental functioning and self-sufficiency? If so, how?

4. Behavior

Is there the ability to avoid life-threatening behavior? Be specific, list each behavior, the intensity and frequency.

- Understands own vulnerabilities to others and takes precautions
- Demonstrates, but does not identify behavior which makes self vulnerable to others—can still make informed consent
- Behavior interferes with ability to make informed consent or act in own best interest—how?

Type of behavior

Repetitive and/or Self-Stimulation. Describe.

Verbal aggression:

- Yells or hollers, to no specific person
- Yells and hollers towards others
- Threatens others
- Threatens to harm self

Physical aggression towards others:

- Physically threatening, but no contact
- Physical contact without injury
- Physical contact with minor injury
- Physical contact with major injury

Self-injurious behavior:

- No injury
- Minor injury
- Severe injury

Intensity of Behavior

- Interferes with no one
- Interferes with self only and can be ignored, may require some redirection, minor disruption
- Interferes with others, requires intervention to redirect or block behavior, major disruption
- Disrupts entire environment, requires immediate intervention, may cause serious injury (skin or tissue damage)

Frequency of Behavior

- 1 x/day
- 2-3 x/day
- 4-6 x/day
- 7-12 x/day
- 13+ x/day

Point to Consider

Remember that dependency itself is not indicative of incapacity; neither is physical infirmity, lack of mobility, or medical weakness.

B. Independent Living Skills

What is the person's ability to functionally attend to personal and financial needs? Does the person require any adaptations or special devices in order to perform any of these activities? For each area indicate the following:

- Performs independently or can independently direct care
- Requires minimal supervision/assistance
- Requires verbal and/or physical instruction - expected outcome is of increased functional capacity
- Requires on-going verbal and physical instruction; continued assistance likely
- Unable to participate in activity

1. Self-Care

What is the person's ability to functionally attend to personal physical needs?

Nutrition

Can the person do a minimum level in meal planning and nutrition?

Can the person make sure he or she has adequate intake of nutrition and hydration?

Personal Hygiene/Grooming/Dental Care

To what extent can the person make sure he or she is bathed, hair is groomed, oral hygiene is maintained?

Toileting

To what extent is person continent of bowel and bladder?

Dressing

Is there an ability to dress, or make sure that dressing is, appropriate for occasion, function, and to maintain physical health and safety?

2. Personal Health

Is there an ability to respond to health needs which endanger physical health and safety? Yes/No

- Knows about specific health problems
- Can self-medicate, take over the counter medications
- Is a reliable reporter of pain or distress
- Can make informed consent - voluntary, informed
- Can make and keep medical appointments
- Can complete routine medical self-care
- Can choose or refuse treatments
- Understands benefits/risks of treatment

3. Activities of Daily Living/Household Management

What is the person's ability to functionally perform household tasks to assure safe and healthy physical environment, e.g., food preparation, cleaning, routine tasks/chores, use of appliances/devices?

Shelter

Are there potential high risk factors which may contribute to the abuse or neglect of the person?

Is there an ability to maintain/repair or to assure maintenance/repair of safe shelter?

Point to Consider

A problem in one or two areas of functional capacity, does not, in and of itself, demonstrate a need for guardianship or conservatorship. You should look at the whole person and at what supports can provide the highest level of independence.

Money Management

What is the person's ability to functionally manage money to assure personal needs are met, e.g., identifies currency, counts money, pays bills, purchases needed/wanted items, saves money for future needs, uses and maintains a checking account, budgets?

- Can collect money or benefits owed to self
- Can collect some, but not all money
- Cannot collect, but can direct how it is spent
- Cannot collect or direct without assistance
- Cannot collect or direct with any level of assistance
- Understands currency, writes checks, signs checks
- Can make routine purchases - clothes, medications, bills, groceries
- Recognizes financial exploitation
- Gives money or property away to friends or family when asked to even though it is not in own best interest
- Gives money or property away to anyone who asks

Community Living

What is the person's ability to functionally access and participate in community services as needed/desired, e.g., communication skills, street safety, accessing transportation, awareness of accessible community environments/services?

Leisure and Recreation

What is the person's ability to functionally perform skills necessary to participate in individual and group activities as needed/desired, which reflect person's personal interest/preferences in home and community e.g., choice making, expressing preferences, ability to initiate or engage in activities alone or with others?

Personal Safety/Self-Preservation

What is the person's ability to protect personal health and safety?

- Is capable of self-preservation; recognizes signs/warnings of danger or emergency, independently seeks safety and/or assistance without prompts
- Requires verbal/physical assistance for self-preservation; will avoid or escape danger or practice safety with minimal prompts/assistance
- Is not capable of self-preservation; places or does not remove self in danger/ emergencies requires presence of another person at all times to assure health and safety

C. Values and Goals

1. Personal Desire

What are the person's desired goals or outcomes for life?

2. Life Perspective

What is person's outlook on life?

D. Social/Family Supports

Does the person have regular and on-going contact and support from family, friends, case management, or social services professional care staff, direct care staff? If so, describe them. If not, explain.

List names and relationship/title of each support person, document frequency and level of support or involvement. Be specific.

With adequate information and resources could any of these people increase or modify their involvement to aid the person in meeting his or her personal needs and/or managing the estate?

E. Recent Stressors

What may have occurred in the last 12 months that may temporarily be affecting the person's ability to make sure personal safety or money management ability?

F. Historical Lifestyle

Emotional/Mental Condition

Physical/Medical Condition

Environment/Living Condition

Social/Community Condition

What is the history and degree of the above?

What impact, if any, does this have on the person's ability to meet his or her needs for personal safety and physical health; any recent changes in the person's life in the areas listed above?

Does any of this warrant an intrusive intervention such as a guardianship or conservatorship? If so, how and why?

G. Least Restrict Decision Making Alternatives

Is there an ability to determine and understand the impact of alternatives? Describe.

What less restrictive alternatives or supports, formal or informal, exist which are being used to assist the person to assure personal needs and safety are met?

What less restrictive alternatives have been considered and/or rejected and why?

What is the person's current understanding of guardianship process and consequences?

What is the least restrictive guardianship/conservatorship plan that can be developed for the person, if needed?

What are the person's personal desires for a guardian or conservator?

Powers

Based on the results of this assessment set out in writing which powers the petitioner for guardianship or conservatorship will seek and state why:

1. To have custody of the ward and to establish the place of residence

The power to determine the ward's place of residence consistent with law and the least restrictive environment consistent with the ward's best interest

2. Provide for care, comfort, and maintenance needs

The duty to assure that provision has been made for the ward's care, comfort, maintenance needs, including food, shelter, health care, social, and recreational requirements and whenever appropriate, training, education, and habilitation or rehabilitation

3. Take reasonable care of personal effects

The duty to take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects

4. Consent to medical or other professional care

The power to give necessary consent to enable the ward to receive necessary medical or other professional care, counsel, treatment, or service

5. Contracts

The power to approve or withhold approval of any contract the ward makes

6. Collect income and pay claims

The power to collect all debts and claims for the ward and to make payments to or for the benefit of the ward; the power to invest and actively manage the estate of the person.

These materials are a general summary of the law. They are not meant to completely explain all that you should know about guardianship and conservatorship. You should see a lawyer to get complete, correct and up-to-date legal advice. Iowa's law on guardianship and conservatorship is found in Iowa's Probate Code starting at section 633.551.



HOPE. DIGNITY. JUSTICE.

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